Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

SERENA NILES,

Petitioner,

v.

GEOFFREY M. PARKINSON, AS TRUSTEE OF THE LAURA J. NILES TRUST, AND THE LAURA J. NILES FOUNDATION, INC.

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Judge Seybolt presided over a New Jersey state court proceeding that adjudicated Laura Niles', her sister-in-law Serena Niles', and Laura's nephew Salvatore Bono's rights. The proceeding also adjudicated a devise of a parcel of real estate to Petitioner Serena Niles and imposed various surcharges and fees on Petitioner Serena Niles, who was neither a trustee or other fiduciary. While that proceeding was pending, Salvatore Bono, Serena Niles' son and substitute trustee, made claims in the federal action against Judge Seybolt personally, alleging specific facts demonstrating Judge Seybolt was not acting as an impartial arbiter when he initiated probate proceedings while Laura Niles was still alive. Judge Seybolt appeared in the Federal Action and instead of requesting a stay of those proceedings, adopted arguments made by other defendants who were also opponents of Salvatore Bono and Serena Niles in the New Jersey proceeding over which Judge Seybolt was presiding. This Court has established that a judicial officer must remain impartial and that the due process clause guarantees that parties have a right to be heard by an impartial tribunal. This Petition should be granted to address whether a litigant's due process right to an impartial tribunal is violated when a presiding state court judge takes a position that is so hostile to a co-litigant and to litigant petitioner Serena Niles that it precludes impartial adjudication of Petitioners' due process rights.

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OPINIONS BELOW

The decision of the Supreme Court of New Jersey denying Serena Niles' Petition for Certification is unreported. (App. A, 1a.) The decision of the Superior Court of New Jersey Appellate Division is unpublished. (App. B, 29.) The Appellate Division decision is set forth in its entirety. (App. B, 2a-46a).

JURISDICTION

The Supreme Court of New Jersey entered a final decision in this case on September 6, 2002 when it denied Niles's Petition for Certification. (App. A, 1a.) This Court extended

the time for filing a Petition for Writ of Certiorari to January 4, 2003. This Court has jurisdiction under 28 U.S.C. §1257(a) because the New Jersey appellate decisions affirming the judgment of the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County court decision violated Niles' procedural and substantive due process rights under the Fourteenth Amendment of the United States Constitution. Petitioner Niles understands that a Petition for Writ of Certiorari on behalf of Salvatore Bono was filed on January 3, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Code of Judicial Conduct, Canon 3, section C(1)(a)

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer or has personal knowledge of disputed evidentiary facts concerning the proceeding.

United States Code, 28 U.S.C. §455

> (A) any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality reasonably be questioned.
>
> (B) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

INTRODUCTION

This case is a prime example of what happens when judicial officials, who are supposed to be impartial and impart equitable justice to all, abandon those principles and take sides in the controversy that they are charged with adjudicating impartially. Geoffrey Parkinson ("Parkinson"), a stockbroker, along with others, concocted a scheme to illegally seize full control of the considerable assets of elderly persons, including Henry Niles ("Henry") and his sister Laura Niles ("Laura"), by subverting and manipulating the judicial system. Laura and her younger brother Henry, inherited sizeable fortunes from their father's estate which included thousands of shares of General Electric stock (App. B, 5a.) Neither Laura nor Henry ever held a job during their lifetimes. (App. B, 5a.) On November 4, 1992 after a long relationship, Henry married Serena Zito. Henry died five years later on December 27, 1997 with no children. (App. B, 6a.)

In 1997, Laura J. Niles (now deceased) amended certain trust instruments which she had executed in 1992. (App. B, 10a.) She also executed certain additional testamentary documents. (App. B, 11a.) As part of the 1997 amendments, Laura Niles substituted her Nephew Salvatore Bono, Serena Niles' son, for Geoffrey Parkinson as testamentary trustee.

(App. B, 11a.) Later in 1997, Laura Niles created a new trust to replace the trust in which Parkinson had been named as trustee. (App. B, 11a.) The amendments effectuated certain additional changes, as well. The withdrawing trustee, Geoffrey Parkinson, filed a complaint for the approval of his accounting. As part of the complaint, he alleged that the 1997 amendments were the result of undue influence upon Laura Niles by her nephew Salvatore Bono, Serena Niles' son and her lawyer. (App. B, 13a, 14a.)

He made no specific allegations against Serena Niles. A year later, the Laura J. Niles Foundation, which had been established under the 1992 documents, filed a Complaint and then an Amended Complaint alleging undue influence by Serena Niles. (App. B, 15a.) A Consent Order was entered on May 12, 1999, consolidating the Foundation's Complaint with the Complaint previously filed by Parkinson. (App. B, 15a.) The court bifurcated the issue into two hearings. One hearing focused on Salvatore Bono's accounting and whether he should be removed as trustee and the second hearing focused on the undue influence. (App. B, 15a.)

In the spring of 1999, the trial court (Honorable Harry K. Seybolt, J.S.C.) (hereinafter "Judge Seybolt" or "Seybolt") presided over an accounting proceeding which concluded on July 15, 1999. (App. B, 15a.)

Thus, Parkinson, with the connivance and support of the New Jersey courts, started nothing less than a probate proceeding against Laura while she was still alive. After Laura tried to dismiss him as her advisor, Parkinson's verified pleading in New Jersey state court falsely claimed that Laura was incompetent. Judge Seybolt, who presided over the New Jersey proceeding brought by Parkinson, knowingly accepted Parkinson's fraudulent pleadings and participated in Parkinson's scheme to deprive Laura of her rights and punish Bono and his mother Serena Niles for his attempt to defend against Parkinson's scheme. Based on knowingly false

statements Parkinson had filed, Bono was temporarily removed as trustee on September 18, 1998; thereafter, Bono was barred by Judge Seybolt from defending himself, and at the conclusion of the accounting proceeding, Judge Seybolt permanently removed Salvatore Bono, who had served since 1997 as trustee, and surcharged him various sums. (App. B, 18a.) Judge Seybolt issued the opinion on August 3, 1999, after Bono filed suit in federal court against Parkinson and others, including Judge Seybolt, asking the Federal Court to intervene. The Federal Action was filed on June 29, 1999. (App. B,18a.) Seybolt denied a stay proceeding. (App. B, 16a.) Seybolt then publicly joined forces with other defendants in the Federal Action who were also Bono and Serena Niles' opponents in the New Jersey case over which Seybolt was presiding. Judge Seybolt went so far as to officially adopt arguments made by others in the Federal Action. (App. A, 92.)[1] Seybolt then dropped all pretense of impartiality and became outwardly hostile to Bono and his mother, Serena Niles.

In fall of 1999, Judge Seybolt tried the second phase of the case, the undue influence matter. By that time, Laura Niles had suffered a severe stroke and had become disabled. The stroke was in September 1997, which is *after* all the events that were the subject of the actions before Judge Seybolt. (App. B, 19a.) Parkinson obtained an *ex parte* appointment of a pre-selected guardian, Michael S. Selvaggi ("Selvaggi"), who was supposed to represent Laura's interests but actually advocated for Parkinson. Selvaggi then falsified the statements of eighteen witnesses to conceal pertinent information he had learned from witnesses sufficient to vitiate Parkinson's knowingly false claims and those raised against Serena

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[1] Petitioner asks this Court to take judicial notice of the pleadings and documents contained in the court's file in *Bono v. Barnowsky, et al.*, No. CV 99-3688 (TCP), in the United States District Court for the Eastern District of New York. *See* Fed. R. Evid. 201.

through the Laura J. Niles Foundation. Seybolt ignored the correcting affidavits and Selvaggi's false Guardian report and also barred the release of the handwritten notes Selvaggi had taken during the witness interviews. Selvaggi found that Parkinson and the Laura J. Niles Foundation had made a prima facie case of undue influence and that the matter ought to proceed to trial before Judge Seybolt. Selvaggi did not conclude that there had actually been undue influence by Serena Niles.

By ignoring overwhelming evidence to the contrary including the May 21, 1997 videotape memorializing Laura Niles' will and wishes, at the conclusion of the case on or about October 27, 1999, Judge Seybolt found that he had adduced sufficient evidence to demonstrate the existence of a confidential relationship between Laura and Serena Niles, her sister-in-law, and that there were suspicious circumstances in connection with the execution of the 1997 documents. (App. B, 29a.) As a result, Judge Seybolt shifted the burden of proof from Parkinson and the Foundation to the proponents of the 1997 amendments to establish that they were not the result of the undue influence. (App. B, 30a.)

At the conclusion of the trial, Judge Seybolt determined, in a letter opinion dated January 10, 2000, without even eliciting the opinion of the guardian ad litem, that the 1997 amendments were the product of undue influence. (App. B, 29a.) Consequently, he set the amendments aside and directed that the 1992 documents (and their modifications) control the disposition of the Laura J. Niles estate. (App. B, 30a; App. B, 46a-52a.) Judge Seybolt also set aside the intended devise of the real estate (a condominium apartment in Florida) a ruling which was based, ostensibly, on a finding of undue influence. The only evidence of undue influence in the trial proceedings, however, related to what plaintiffs described as efforts by Serena and her son Salvatore to induce

Serena's sister in law, Laura J. Niles, to substitute Bono for Geoffrey Parkinson as trustee of a multi-million dollar foundation and trust.

In March 2000, Judge Seybolt heard plaintiff's application for the award of various fees and costs against Serena Niles and Salvatore Bono. By final judgment dated March 24, 2000, Judge Seybolt awarded fees against Serena Niles and fees and costs jointly and severally against Serena Niles and Salvatore Bono. (App. B, 46a-52a.)

Judge Seybolt, as part of his judgment, imposed on Serena and Bono, jointly and severally, "surcharges" for the fees charged by Laura's counsel in effectuating the revisions. These fees totaled $314,282.00, encompassing not only the work required to substitute Bono for Parkinson but also all of the work relating to the numerous changes that were sustained. (App. B, 47a-52a.)

Serena had nothing to do with the retention of the lawyers who represented Laura and she had no discussions with them that were in any way pertinent to any of the revisions in Laura's estate plan. The wholesale imposition of this "surcharge" on Serena is at variance with traditional concepts developed by courts in the last two centuries.

The trial court also assessed damages in the amount of $50,000.00 against Serena and Bono for certain purchases effectuated by Bono. The trial court did this without any adequate showing in the record that the purchases were either not at Laura's direction or not for her benefit. (App. B, 52a.)

Finally, the trial court imposed a "surcharge" of $162,014.00 against Serena for counsel fees incurred in defense of her claim of entitlement to the condominium. (App. B, 51a.) The trial record does not reveal any undue influence specifically in connection with that proposed transfer.

The issue presented here is whether a co-litigant like Serena Niles may be deprived of property rights without a hearing before an impartial tribunal. This Court has previously held that the Due Process Clause requires that a party's rights be adjudicated by an impartial arbiter. Serena Niles had her property taken away and a judgment entered against her by a judge who, from the beginning, exhibited obvious bias and blatantly adopted and advocated adversarial legal positions in other pending litigation where the judge was a party. The issue is not whether, by suing a judge, a litigant may force the judge to recuse himself or herself. Instead, the Petition asks whether, in addition to clear bias evident from the inception of the case, Judge Seybolt's own choice to appear and join forces with Serena Niles' opponents in the Federal Action disqualified him in the state proceeding under principles of due process.

STATEMENT OF THE CASE

A. Geoffrey Parkinson Gains Control Over Millions in Assets by Establishing Foundations and Trusts for Siblings Henry and Laura Niles.

Geoffrey Parkinson was the financial advisor to Laura and her brother Henry and named himself as a director of charitable foundations he set up for Laura and Henry. (App. B, 5a.) Parkinson arranged for the creation of trust instruments giving him control over his clients' financial affairs, including Laura and Henry, while generating substantial fees for him as a trustee and for his financial advisory company. (App. B, 5a.) Parkinson was appointed as trustee of a revocable trust set up by Laura and two Charitable Remainder Unitrusts with Laura as grantor and settlor. (App. B, 7a.) Parkinson also had himself and a friend, Leland Selby, named as a directors of the Laura J. Niles Foundation, the residuary beneficiary under various trust instruments. (App. B, 5a.). The Trusts and the

Foundation together controlled over fifteen million dollars in assets, generating substantial fees for Parkinson and others involved in the scheme.

B. Parkinson Secretly Tries to Get Appointed as Henry's Conservator in an Involuntary Proceeding to Maintain Control Over Henry's Assets and Keep Henry From Marrying Serena.

In or about 1990 or 1991, Parkinson approached Laura and made a number of ill comments against Serena and Henry to obtain her consent to having a limited judicial conservator appointed to help her brother Henry with his financial affairs. (App. B, 6a.) But Parkinson did not file that Petition and instead, without telling Laura, he filed an involuntary petition designed to keep Parkinson in control of Henry's assets and to prevent Henry from marrying Serena Niles, Bono's mother. (App. B, 6a.) The marriage was delayed for eighteen months, and a New York court appointed a conservator which stripped Henry of all control over his assets, leaving him with only a set monthly allowance that could not be spent without the conservator's permission. (App. B, 6a.) Parkinson then considers Henry to be competent to execute a revised "Services Compensation Agreement" that more than doubled his fees. The marriage took place on November 4, 1992. The conservator initiated annulment proceedings, which were withdrawn when Serena entered into a post-nuptial agreement. (App. B, 6a.) Henry died over five years later with no children. (App. B, 6a.)

C. Laura Discharges Parkinson as Trustee and Replaces Him With her Nephew, Bono, But Parkinson Refuses to Relinquish Control.

At Laura's request, a law firm drafted documents to discharge Parkinson as trustee and replace him with Bono, as well as make other changes to her estate plan, and these

wishes were confirmed by Laura in documents executed in her own handwriting. (App. B, 11a.) Laura told Parkinson that she was discharging him, but he refused to resign as a director of the Laura J. Niles Foundation, Inc. (App. B, 10a, 11a.) Laura then established a New York corporation known as the Niles Foundation, Inc. which was named as the replacement residual beneficiary of her various trusts. (App. B, 12a.) The ceremonies where the documents were signed by Laura were videotaped, and neither Bono nor Serena Niles, her sister in law, were present. (App. B, 10a.) Dr. Schlesinger examined Laura and felt she knew where she was, why she was there and what she wanted to do. (App. B, 10a.)

D. Parkinson Files a Knowingly False Verified Complaint in the New Jersey State Court.

On January 22, 1998, Parkinson filed a Verified Complaint in his individual capacity in the Superior Court of Warren County, New Jersey to have Bono removed as trustee and challenging Laura's competency even as he attached to the complaint trust amendments, advisory fee contracts, and other agreements entered into between Parkinson and Laura *after* the date he claims she suffered from alleged mental impairments. (App. B, 14a.)

E. Parkinson, in an Illicit Ex Parte Proceeding, has His Chosen Guardian Appointed for Laura.

On January 22, 1998 Parkinson made an *ex-parte* motion for appointment of his chosen Guardian Ad Litem for Laura. (App. B, 14a.) Parkinson pre-selected Selvaggi as his chosen guardian by typing his name in the order presented to the court for entry, and even though Parkinson was adverse to Laura and no hearing was held, the New Jersey court signed and entered the *ex-parte* order prepared by Parkinson naming

Selvaggi as guardian ad litem to Laura. Selvaggi fabricated a report loaded with false and misleading statements supporting Parkinson's position. Eighteen witnesses submitted sworn affidavits stating that the report misquoted them and/or omitted material information and other witnesses made it clear that Selvaggi intentionally distorted and falsified statements they had made to him. (App. B, 14a.) Selvaggi did not make any finding on the undue influence issue as it related to Serena Niles.

F. Judge Seybolt Orders That a Hearing be Held on the Issue of Undue Influence and Summarily Removes Bono as Trustee.

Based on Selvaggi's false report and despite clear video-taped evidence that Laura was competent when she discharged Parkinson and replaced him with Bono, Judge Seybolt found a *prima facie* case of undue influence and directed that a plenary hearing be held to resolve that issue. (App. B, 14a.) The Laura J. Niles Foundation, which Parkinson continued to control despite Laura's efforts to discharge him, then filed a Verified Complaint seeking relief as against Serena Niles. (App. B, 15c.)

The matters were consolidated with those of Parkinson. (App. B, 15a.) Judge Seybolt then summarily removed Bono as trustee under the three trusts. In addition, without any hearing, Judge Seybolt directed that Bono be permanently removed as a director from the Niles Foundation, Inc., a New York corporation which is subject to oversight by the New York Courts. (App. B, 15a.)

G. Bono Seeks Protection and Justice for Laura, His Mother, and Himself by Filing an Action in Federal Court Against Seybolt and Others.

While Judge Seybolt was conducting the undue influence hearings in state court, Bono commenced an action, *Bono v. Barnosky, et al.*, No. CV 99-3688 (TCP), in the United States

District Court for the Eastern District of New York (the "Federal Action"), against Seybolt, Parkinson, and others seeking damages and injunctive relief for violating Laura Niles' Serena Niles', and Bono's civil rights and for corrupt acts alleged to have injured Bono in his person and property in violation of the RICO statute. The essence of the Federal Action was that Judge Seybolt became a voluntary participant in a scheme by Parkinson and others associated with him to control the affairs of wealthy elderly individuals like Laura and Henry and to manipulate the legal system to maintain this control over their fortunes. The scheme described in the Federal Action involved the prosecution of conservatorships or similar proceedings on the basis of false claims of incapacity, the submission of baseless doctor's reports, the appointment of biased guardians or conservators who act in concert with them and are appointed *ex-parte*. Judge Seybolt denied a stay of proceedings and proceeded without Bono's participation, leaving Serena to defend the actions.

H. Judge Seybolt Officially Joins in Pleadings Filed by Parkinson and Other Defendants in the Federal Action While Continuing to Preside Over the Niles Matter and Ruling on Bono's Conduct.

In the Federal Action, Judge Seybolt officially aligned himself with the other defendants opposing Bono's requests for relief. Judge Seybolt "join[ed] in the motion to dismiss [Bono's] RICO allegations" made by other defendants and in the "brief filed by Michael Loprete, Esq." on behalf of other defendants. (App. D, 55a.) Counsel for Bono asked Judge Seybolt to recuse himself based on Seybolt's actions taking sides against Bono. (App. B, 16a, App. B.) Judge Seybolt denied the motion without a hearing. (App. B, 18a.)

I. Judge Seybolt Openly Aligns With Parkinson in the State Court Proceeding.

Having successfully prohibited Bono, at Parkinson's behest, from participating in the state court case, Seybolt now turned openly hostile to Bono and Serena. In a prior opinion Judge Seybolt had stated that his "review of the videotapes of [Laura Niles'] execution of the trust modifications . . . showed a sense of humor and a surprising alertness for one who is 88 years old." (App. B, 25a.) A few months after responding to Bono's amended complaint in the Federal Action, Seybolt looked at the same videotape and completely altered his position, stating that "the videotape clearly shows Laura was in a weakened condition and she had very little input into these wholesale changes presented to her at that time." (App. B, 26a, App. B 28a.) Judge Seybolt also altered the burden of proof applicable to Parkinson's undue-influence charge, requiring Serena to rebut a presumption that undue influence occurred.

J. The New Jersey Appellate Courts Ignore Bono and Serena's Due Process Arguments and Rubber Stamp Judge Seybolt's Inexplicable Rulings.

Serena filed a timely appeal to the Appellate Division of the Superior Court of New Jersey asking that Judge Seybolt's judgment be reversed. Bono also filed an appeal. Serena in her brief and in her petition for certification to the New Jersey Supreme Court, adopted all the due process arguments made by Bono. (App. B, 38a, App. F.) Bono and Serena's opponents in the Federal Action, deprived Serena of her due process rights to have claims against her adjudicated by an impartial judicial officer, and Seybolt's other rulings in violation of New Jersey law also deprived Serena of due process. Serena joined in Bono's due process argument. The Appellate Division, in affirming the judgment, did not even address

the due process argument and merely approved of Seybolt's refusal to recuse himself, holding that it was within his discretion to do so. (App. B, 43a.) The New Jersey Supreme Court, without comment, denied Serena's Petition for Certification on September 4, 2002. (App. A, 1.) Serena Niles now asks this Court to grant her Petition. Serena is aware that Bono filed a Petition for a Writ of Certiorari on January 3, 2003.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Petition presents an important issue of Constitutional Law—can a judge who blatantly and expressly joins adversaries of a litigant against one of the litigants appearing before the judge maintain constitutionally-required impartiality. This Court has previously held that a litigant has a right under the Due Process Clause to have disputes adjudicated by an impartial tribunal.

I. PROCEDURAL DUE PROCESS DEMANDS THAT LITIGANTS' DISPUTES BE ADJUDICATED BY AN IMPARTIAL TRIBUNAL

Judge Seybolt's actions implicated Serena Niles' Fourteenth Amendment due process rights when he refused to recuse himself from the trials of Salvatore Bono and Serena Niles.[2] In *Tumey v. Ohio* the Court stated that "it violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The due process clause protects not only

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[2] Federal judges are obligated to disqualify themselves whenever their impartiality "might be reasonably questioned." 28 U.S.C. § 455(a). *See also* New Jersey Code of Judicial Conduct, Canon 3(C) contains the identical language.

against express judicial improprieties but also against conduct that threatens the "appearance of justice." *Aetna Life Insurance v. Lavoie et al.*, 475 U.S. 813, 825 (1986). In finding that a state judge "acted as a judge in his own case" in a civil matter, the Court echoed *Tumey*, while recognizing that the appellant insurer's "case presented more than mere allegations of bias and prejudice" where an Alabama Supreme Court Judge's opinion had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. *Aetna Life Insurance*, 475 U.S. at 821 and 824 (1986) (where an Alabama Supreme Court Judge filed two actions *in* an Alabama Court against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages, while a petition for rehearing was pending on the same issue before the Alabama Supreme Court) (*citing Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

"[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). In *Offutt v. United States*, 349 U.S. 11 (1954), where this Court determined that a judge who became personally embroiled with counsel during trial should ask another judge to conduct a hearing charging that same counsel with contempt, this Court stressed that "justice must satisfy the appearance of justice." *Id.*, 349 U.S. at 14. This principle applies to civil cases as well as criminal cases. *See Marshall v. Jericho, Inc.* 446 U.S. 238, 242 (1980). The requirement of impartiality "helps to guarantee life, liberty or property will not be taken on the basis of erroneous or distorted conception of the facts or the law." *Id.*

II. DUE PROCESS PROHIBITS A JUDGE FROM ADOPTING AN OPENLY ADVERSARIAL STANCE AGAINST A LITIGANT, ESPECIALLY IF A CO-LITIGANT SUES THE JUDGE IN ANOTHER FORUM

That Judge Seybolt was automatically required to recuse himself when Bono sued him has been rejected by the federal courts, and Serena Niles does not challenge that principle. *See United States v. Pryor*, 960 F.2d 1, 3 (1st Cir. 1992) ("It cannot be that an automatic recusal can be obtained by the simple act of suing the judge"); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986) ("A judge is not disqualified by a litigant's suit or threatened suit against him") *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977) (same).

In the instant case, by brazenly aligning himself with the parties opposing Niles in actually adding his name to and participating in the Federal Action instituted by Serena Niles' son Bono, a fellow litigant against him, Judge Seybolt obtained a "direct, personal, substantial pecuniary interest" in reaching a conclusion against both Bono and Niles, while enabling himself to act as judge in his own case. Should Parkinson, *et al*, triumph over Bono and Niles in the New Jersey action, the federal defendants, including Seybolt, could enhance their legal status in the Federal Action by arguing that the federal suit by Bono was merely a baseless distraction designed by an unsuccessful party in an attempt to suspend the New Jersey action.

Federal courts agree that a judge must recuse himself even when his or her name is tangentially connected with a position advanced by an adversary in a current action he is concurrently adjudicating. *See Republic of Panama v. American Tobacco Co.*, 217 F.3d. 343 (5th Cir. 2000) (trial judge ordered to recuse himself merely because his name appeared on a brief filed by the state trial lawyers' association in an unrelated case); *see Bradshaw v. McCotter*, 785 F.2d

1327 (5th Cir. 1986), *rev'd on other grounds*, 796 F.2d 100 (5th Cir. 1986) (recusal required where state criminal appeals judge's name was listed on a brief as a state prosecuting attorney in the defendant's appeal, though the judge did not actually participate in the prosecution of the case). The scope of the inquiry required under § 455(a) is "not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of the circumstances." *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The circumstances in the present case show that Judge Seybolt's behavior was not impartial from any point of view. Judge Seybolt purposefully and publicly aligned himself with the parties adversarial to the Petitioner and actually participated in their common defense to Petitioner Bono's federal allegations. Where a judge has actively aligned with those opposing a litigant appearing before the judge, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Though actual knowledge of a pending case may embroil a judge in Fourteenth Amendment concerns vis-à-vis a litigant, scienter is not an element of a violation of § 455(a). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988) (where a judge sitting on a University's Board of Directors tried a case which ultimately benefited the University). The judge's lack of knowledge of a disqualifying circumstance . . . does not eliminate the risk that "his partiality might reasonably be questioned" by other persons. *See id.* Moreover, the Congressional intent of § 455(a), which was to promote public confidence in the integrity of the judicial process, does not depend upon whether or not the judge actually knew of facts creating the appearance of impropriety, so long as the public might reasonably believe

that he or she knew. *Id.* Here, Judge Seybolt far surpassed the appearance of impropriety—he actually assumed a position adversarial to the Petitioner, and did so in the public eye.

Upon the mere public appearance of impropriety, a fairly low standard, Judge Seybolt should have recused himself immediately upon having his partiality questioned in light of his active participation with Parkinson and other parties opposing Bono in the federal suit against Seybolt. Petitioner Niles does not argue that Judge Seybolt was required to recuse himself merely because Petitioner Bono sued him in federal court, but because Petitioner Niles' due process protections were compromised when Judge Seybolt aligned himself with the parties opposing Niles in the current suit.

A. The Niles and Bono Actions are so Enmeshed by Fact and Law that their Due Process Rights are Inextricably Intertwined for the Purposes of Judge Seybolt's Recusal

The Niles and Bono actions are based upon the same facts and occurred simultaneously.[3] The record makes it plain that Judge Seybolt did not merely rule against Bono and Serena on contested issues—Seybolt, from the beginning, aligned himself with Parkinson to protect Parkinson's interests at the expense of Bono and Serena.

In her Petition to the New Jersey Supreme Court Serena Niles adopted the due process arguments of Bono, writing, "Serena also joins in those arguments presented by Bono in his petition for Certification to the extent that they affect her." (App. F.) The outline of the Due Process argument is set forth in the opinion of the Appellate Division. (App. B, 37a-38a.)

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[3] 28 U.S.C. § 455(b)(1) further directs federal judges to disqualify themselves "where [they] have a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1).

The New Jersey appellate courts failed to intervene and simply concluded that Seybolt himself had apparently unlimited discretion to decide whether he should recuse himself or continue to preside and make certain that Parkinson's scheme was successful. The Appellate Division wrote, "we are satisfied Judge Seybolt properly exercised his sound discretion in denying Salvatore's application for recusal; recusal rests in the sound discretion of the trial judge whose impartiality is challenged." *Panitch v. Panitch*, 339 *N.J. Super.* 63, 66 (App. Div. 2001); *Jadlowski v. Owens-Corning*, 283 *N.J. Super.* 199, 221 (App. Div. 1995), *certif. denied.*, 143 N.J. 326 (1996). The New Jersey proceeding presided over by Seybolt made a mockery of the Due Process Clause's guarantee of a hearing before an impartial arbiter.

B. Judge Seybolt's Actions in Choosing to Actively Participate in Tandem with Parties Opposing Bono in a Federal Suit Against the Judge by the Bono Necessitated his Recusal in the Niles Action because Judge Seybolt's Partiality in Bono's Action Compromised his Ability to Remain Impartial in Petitioner Niles' Action

A reasonably objective observer, looking at Judge Seybolt's partisanship on behalf of Parkinson and his efforts to cover up that favoritism, would conclude that by taking an active role as an adversary to Bono, one of the litigants before him, Judge Seybolt abandoned his impartiality. After receiving Bono's First Amended Complaint in the Federal Action that, *inter alia*, challenged Seybolt's improper, *ex parte* appointment of a guardian ad litem and other actions taken in favor of Parkinson, Seybolt deprecated Bono's Federal Action pleading on the record during the state proceeding. (App. B.) In an attempt to defend the appointment of Parkinson's chosen guardian, Seybolt began claiming that Parkinson filed his false Verified Complaint on January 20, 1998, instead of January 22, 1998, as he had

previously stated and despite a myriad of other documents in the record, including his own orders, belying that assertion. The filing date is critical because it determines whether, as Bono alleged, the guardian was improperly appointed *ex parte*. Seybolt's stated impressions of Laura's competence when she replaced Parkinson with Bono as her financial advisor changed markedly after Seybolt received the Amended Complaint. Instead of being a woman with a surprising sense of humor and alertness, Seybolt now called her a woman who was in a weakened condition with very little input in her affairs. After receiving the Amended Complaint in the Federal Action, Judge Seybolt entered a default against Bono, struck his pleadings without the required notice being given, prohibited Bono from any further participation in the proceedings, removed him permanently as trustee, and entered a million dollar judgment against him even though none of the pleadings gave notice that damages were being requested. Seybolt also forced Serena to trial of the undue influence action without the participation of Bono or his counsel.

The Petition should be granted to address whether, under these circumstances, Serena Niles was deprived of her due process rights because Seybolt, who had become her adversary, continued to preside over the state court matter.

CONCLUSION

Serena Niles was deprived of the most fundamental protections of due process and her substantive rights at every phase of the proceeding. A double standard was applied by the court to deliberately injure Petitioner, members of her family, and all those whose interests were adverse to Parkinson's scheme. The issue presented in this Petition is an important question of law involving this Court's Due Process jurisprudence, and the Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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